No. 82-1766

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

SECURITIES INDUSTRY ASSOCIATION,
Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

A.G. BECKER INCORPORATED,
Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

BRIEF OF *AMICUS CURIAE* BANKERS TRUST COMPANY IN SUPPORT OF RESPONDENTS

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June 30, 1983

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* is filed with the written consent of all parties on behalf of Bankers Trust Company ("Bankers Trust").[1] Bankers Trust is a New York State-

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[1] *See* Letter dated June 14, 1983 from Harvey L. Pitt to Jennifer Sullivan, Letter dated June 15, 1983 from James B. Weidner to the Clerk of the Supreme Court of the United States, and Letter dated

chartered member bank of the Federal Reserve System with headquarters in New York City. Bankers Trust participates as agent in the sale of commercial paper by certain corporations not affiliated with Bankers Trust. The September 26, 1980 statement by the Board of Governors of the Federal Reserve System ("the Board") regarding Bankers Trust's commercial paper service is the subject of the instant litigation. Bankers Trust thus has a clear interest in this case.

Bankers Trust participated extensively in the proceedings before the Board, in the district court, where it filed three memoranda of law *amicus curiae*, and in the Court of Appeals, where it filed two briefs *amicus curiae*. Consequently, the continued participation of Bankers Trust as *amicus curiae* will aid the fullest possible development of all available information pertaining to the issues in this case.

REASONS FOR DENYING THE WRIT

I. The Decision Of The Court Of Appeals Does Not Raise Any Issue Of "National Significance."

After nearly two years of exhaustive inquiry and study, including an on-site examination at Bankers Trust and analysis of the role of commercial paper[2] as a credit instrument in the nation's financial system, the Board concluded that Congress did not intend to prohibit com-

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June 16, 1983 from the Solicitor General to Craig Alan Wilson, filed with this Brief.

[2] As stated by the Court of Appeals, the term commercial paper "refers to prime quality, negotiable promissory notes bearing very short maturities" issued by "[l]arge, financially strong corporations . . . to obtain funds for current needs." (4a. Citations in this form refer to pages of petitioners' Appendix.)

mercial banks from selling prime quality commercial paper in large denominations to financially sophisticated customers.[3]

Petitioners solemnly proclaim that the decision of the Court of Appeals upholding the Board "raises important issues of national significance." Petition at 8. That decision may have significance for petitioners themselves, but the significance to them is *competition*. In enacting Glass-Steagall, however, Congress never intended to limit competition, divide markets, or otherwise protect securities firms.[4] Congress intended the Glass-Steagall Act to prevent hazards that potentially arise when commercial banks engage in activities involving certain speculative securities.

The hazards that are the concern of Glass-Steagall are not present in Bankers Trust's commercial paper service. As correctly determined by the Board and the Court of Appeals, the commercial paper sold by Bankers Trust is functionally similar to traditional lending instruments. In addition Bankers Trust's role in the sale of commercial paper is similar to arranging the extension of a short-term loan by a "few sophisticated lenders to financially strong purchasers." (7a.) The institutional purchasers of the

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[3] Federal Reserve System, Statement Regarding Petitions to Initiate Enforcement Action (Sept. 26, 1980) ("Board Statement") (65a-86a).

[4] "Neither the language of the pertinent provisions of the Glass-Steagall Act nor the legislative history evinces any congressional concern for . . . freedom from competition." *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1970) [hereinafter cited as *ICI(1)*], at 640 (Harlan, J., dissenting on the issue of petitioners' standing). *See* H. Angermeuller, *Commercial vs. Investment Bankers*, Harv. Bus. Rev. 132, 134 (Sept.-Oct. 1977).

commercial paper are the same class of purchasers to which banks sell other commercial credit instruments such as certificates of deposit and bankers' acceptances. (27a.) Consequently Bankers Trust's commercial paper activities are functionally equivalent to the "traditional lending functions of commercial banks." (25a.)

Bankers Trust here addresses each of the three issues of "national significance" that petitioners claim are raised by the decision of the Court of Appeals.

A. The Court of Appeals expressly limited its holding.

Petitioners overstate the effect of the decision of the Court of Appeals. Petition at 8. The Court of Appeals held "that commercial banks may sell third party commercial paper provided that they comply with the Board's Guidelines" (30a-31a), and therefore its holding is expressly limited to instruments defined by the Board's Policy Statement Concerning the Sale of Third Party Commercial Paper by State Member Banks:[5] "prime quality commercial paper, of a maturity less than nine months, sold in denominations of over $100,000 to financially sophisticated customers rather than to the general public." (30a.) Furthermore the Court of Appeals expressly limited its holding to bank sales of such instruments in a manner complying with the Guidelines. (31a.) Finally, neither the Board nor the Court of Appeals determined or were ever required to determine whether Bankers Trust's placement of commercial paper constitutes "underwriting" as defined for purposes of the Glass-Steagall Act; having

[5] The Board's Policy Statement (87a-93a) is hereinafter referred to as "the Guidelines."

decided that the commercial paper Bankers Trust sold was not a "security" for purposes of Glass-Steagall, neither reached that issue. Petitioners' references to underwriting therefore are misleading. (31a.)

B. The Board exercised its lawful function to construe and enforce the Glass-Steagall Act.

The threshold issue that has been dispositive in this litigation is whether commercial paper constitutes a "security" for purposes of the Glass-Steagall Act. Congress did not define the term "security" in the act, but has charged the Board with " 'primary and substantial responsibility for administering' federal regulation of the national banking system." (8a.)[6] In exercising this responsibility the Board was called upon to consider first whether the commercial paper sold by Bankers Trust is even a "security" under the act.

Petitioners contend that the Glass-Steagall Act contains "flat prohibitions" and that the Board has improperly taken a regulatory approach to enforcing the act, considering on a "case-by-case" basis whether a particular bank activity is prohibited. Petition at 8-9. These contentions are meritless. By not defining the term "securities" in the act Congress necessarily envisioned that the Board would have to engage in a functional analysis to determine whether a particular instrument is a "security" for

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[6] *Quoting Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1982). *See Board of Governors of the Fed. Reserve Sys.* v. *Agnew*, 329 U.S. 441, 450 (1947) ("Congress has committed the [federal banking] system's operation to their hands . . . because the system itself is a highly specialized and technical one, requiring expert and coordinated management in all its phases") (Rutledge, J., concurring).

Glass-Steagall purposes.[7] In fact, since the enactment of Glass-Steagall the Board has been called upon many times to determine whether a particular kind of note constitutes a "security" for purposes of the act.[8] Where the Board has previously exercised its authority in a

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[7] Even under the federal securities laws, with their elaborate definition of a "security," the Securities and Exchange Commission and the courts have long found it necessary to proceed on a case-by-case basis to determine if an instrument is a "security" for purposes of those laws. As recently held by this Court in determining that certificates of deposit are not "securities" for purposes of the Securities Act of 1933 ("Securities Act"): "Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole." *Marine Bank* v. *Weaver*, 455 U.S. 551, 560 n.11 (1982).

[8] *E.g.*, Letter dated June 8, 1934 from the Secretary of the Board to the Federal Reserve Agent, Federal Reserve Bank of New York (bankers' acceptances are not "securities" for purposes of the Glass-Steagall Act); Letter dated July 13, 1934 from the Secretary of the Board to the Federal Reserve Agent, Federal Reserve Bank of Richmond (notes secured by direct deeds of trust on real estate are not "securities" for purposes of the act); 12 C.F.R. § 218.109 (regulation issued December 2, 1964) (short-term unsecured negotiable notes of the kind issued by some large banks to obtain funds are not "securities" for purposes of the act); Letter dated March 6, 1974 from the Secretary of the Board to the Administrator, Small Business Administration (notes representing portions of loans by nonbank lenders guaranteed by the Small Business Administration are not "securities" for purposes of the act).

Similarly, pursuant to its authority to interpret and enforce the act with regard to national banks, the Office of the Comptroller of the Currency has long construed the undefined term "securities" as not including notes like commercial paper. *See* Letter dated Nov. 19, 1971 from the Chief Counsel, Office of the Comptroller of the Currency, to First National Bank of Minneapolis. Petitioners' characterization of the Board Statement as an "unprecedented" administrative ruling (Petition at 4 n.3) is therefore inaccurate.

certain manner, and Congress has not disturbed that action, the propriety of the Board's action "is entitled to great respect."[9]

Petitioners argue that Congress has rejected the Board's exercise of authority in this manner, both in 1935 and in recent legislation regarding financial services. Petition at 9-10. The proposal in 1935 to amend the McFadden Act to permit national banks to underwrite "investment securities" is not germane because Congress did not consider commercial paper to be an "investment security."[10] The proposal therefore would not have affected the legality of bank activities involving commercial paper. Furthermore, although recent legislation does not explicitly authorize commercial banks to sell commercial paper in compliance with the Guidelines, Congress has not given any indication that it disapproves the Board Statement or Guidelines. The legislation cited by petitioners (Petition at 10 n.7) does not narrow the Board's regulatory authority in this area, but rather focuses on broad issues concerning regulation of the financial services industry. A more reasonable inference from this legislation is that Congress is satisfied with the manner in which the Board is carrying out its responsibilities.[11]

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[9] *Board of Governors of the Fed. Reserve Sys.* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978).

[10] The McFadden Act, ch. 191, 44 Stat. 1226 (1927), authorizes national banks to purchase "investment securities," defined to mean, *inter alia*, "bonds, notes, and/or debentures commonly known as investment securities." 12 U.S.C. § 24. The 1935 proposal would have authorized national banks not only to purchase but also to underwrite "investment securities." As noted by the Court of Appeals, however, the legislative history of the McFadden Act makes clear that Congress did not consider commercial paper to be an "investment security." (19a & n.59.)

[11] Petitioners suggest that Congress indicated disapproval of and limited the exercise of regulatory authority by federal banking agen-

Petitioners try to elevate the importance of their disagreement with the Board Statement to "national significance" by arguing that the Statement is but one of many concerted attempts by "federal banking agencies . . . to dismantle the Glass-Steagall Act through 'administrative interpretation.' " Petition at 11. The decision of the Court of Appeals, petitioners contend, sends a signal not only to the Board but to other federal agencies to continue authorizing new banking services, thus prompting further court challenges by the securities industry. Petition at 8, 12.

The lawfulness of actions taken by federal agencies other than the Board, or of any Board action other than its Statement regarding commercial paper, is not at issue in this litigation and petitioners should not be able to bootstrap other agency actions to justify review of the instant case.[12] Moreover it is inappropriate for petitioners to threaten to expand "the caseload of the federal judiciary" (Petition at 8) by challenging those other agency actions in order to justify this Court's review of the instant case.

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cies when it stated that the Comptroller of the Currency does not have substantive rule-making authority under the Glass-Steagall Act to regulate securities activities of national banks. Petition at 10, *citing* 12 U.S.C. § 93a. This inference is strained at best. Congress simply wanted to make "clear that the rule-making provision [clarifying that the Comptroller has authority to prohibit unsafe or unsound banking practices] carries no authority to permit otherwise impermissible activities of national banks. . . ." Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 842, 96th Cong., 2d Sess. 83 (1980). Moreover Congress explicitly recognized the authority of the Comptroller to make "interpretive rulings which may be requested from time to time, to decide issues related to the Glass-Steagall Act." S. Rep. No. 368, 96th Cong., 1st Sess. 13 (1979).

[12] Although the lawfulness of other agency actions is not at issue in this litigation, Bankers Trust is compelled to point out that petitioners have grossly mischaracterized the rulings by those agencies. In

In support of their arguments petitioners recite a variety of services that commercial banks have been authorized to offer in recent years, claiming that these services were understood for nearly 50 years "to be barred to banks." Petition at 11. That a banking service may be relatively new does not in itself give rise to any intimation of unlawfulness. The ever-changing demands of the marketplace engender innovations in banking and, as the Court of Appeals recognized, the federal banking laws must be allowed to adapt "to the changing needs of our economy." (9a n.25.)[13]

Just as the banking industry has sought to develop new products and services to meet the demands of the marketplace, so securities firms have sought to acquire banking institutions and provide services resembling traditional bank services. For example:

—many securities firms now operate money market funds, which are functionally similar to bank deposits;[14]

—securities firms have recently begun to market the depository accounts and certificates of deposit of

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exercising its lawful regulatory function to interpret and enforce the federal banking laws, each of those agencies thoroughly considered the implications of the activities in question under the Glass-Steagall Act and in light of prior decisions of this Court.

[13] *See M & M Leasing Corp.* v. *Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) (bank laws must be construed to permit "use of new ways of conducting the very old business of banking").

[14] As with bank deposits, money can be withdrawn from a money market fund on demand by using drafts. Thus, "in a very real sense an account in a money market fund is more like a bank account than a traditional investment in securities." *Gartenberg* v. *Merrill Lynch Asset Management, Inc.*, 528 F. Supp. 1038, 1068 (S.D.N.Y. 1981), *aff'd*, 694 F.2d 923 (2d. Cir. 1982).

commercial banks and savings and loan associations, thereby gaining access to a broad base of deposits;[15] and

—securities firms are entering the banking business directly by obtaining state and national bank charters or by acquiring existing commercial banks or savings and loans. In this way securities firms are beginning to compete directly with commercial banks in offering such commercial banking services as IRA and Keogh retirement accounts, credit cards, checking accounts, and personal loans.[16]

It is disingenuous for petitioners to argue on the one hand that the Glass-Steagall Act "flatly" prohibits new services offered by banks, thus foreclosing any flexible response by bank regulators like the Board, while on the other hand securities firms entreat federal bank regulators for authorization and have obtained authorization to

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[15] *See, e.g.*, "Merrill, Fidelity Will Sell All-Savers Offered by Thrifts, Plans May Be Trend of Cooperative Marketing," *American Banker*, Sept. 29, 1981, at 1; "In a Wall Street 'First,' Merrill Selling CDs for Retail Investors," *Securities Week*, June 14, 1982, at 1.

[16] For example, the Dreyfus Corporation, which manages and controls a group of mutual funds, received approval from the Comptroller of the Currency on February 4, 1983 to charter a national bank (Dreyfus National Bank). [Current] Fed. Banking L. Rep. (CCH) ¶ 99,528, at 86,726. In addition Dreyfus has purchased a New Jersey state bank and has agreed to buy Metropolitan Savings & Loan Association, Inc. "Dreyfus Sees Lincoln State as Ideal Acquisition," *American Banker*, Nov. 23, 1982, at 2; "Dreyfus Awaits Word on Bid for Thrift," *American Banker*, Jan. 19, 1983, at 1. Further, Merrill Lynch & Co. has agreed to buy Raritan Valley Financial Corp., the owner of Raritan Valley Savings & Loan Association, *American Banker*, Apr. 28, 1983, at 1, and the Fidelity Group has applied for a state banking charter in New Hampshire. "Fidelity Group's Proposal to Start a Bank in New Hampshire Is Attacked as Unfair," *The Wall Street Journal*, Nov. 8, 1982, at 4.

perform services traditionally offered only by commercial banks.

C. The Court of Appeals properly accorded deference to the Board.

Petitioners argue that the Court of Appeals accorded "undue deference" to the Board's interpretation of the Glass-Steagall Act, thus encouraging the Board to exceed the scope of its regulatory authority. Petition at 12-13. The Board, having "primary and substantial responsibility" for enforcing the act, was required to construe the undefined term "securities" in order to determine whether Bankers Trust's commercial paper service was lawful under the act. (8a-9a.) To this end the Board, with its "expert knowledge of commercial banking," devoted nearly two years of legal and factual study. (8a, 10a.) Any deference by the Court of Appeals therefore could only encourage the Board to perform its lawful regulatory function as intended by Congress.

Furthermore the Court of Appeals did not accord "undue" deference to the Board, thereby abdicating its judicial "responsibility." Petition at 13. To the contrary the Court of Appeals expressly stated: "We do not, however, rest merely on the deference to the conclusions of the Federal Reserve Board." (11a.) The Court of Appeals engaged in its own, separate "analysis of the application of the Glass-Steagall Act to the present case" (*id.*) and as a result concluded that the Board's interpretation of the act was reasonable.

Petitioners argue that any deference at all is "pointless" where an administrative agency "sanctions an activity that violates plain statutory language." Petition at 12

n.14.[17] The Court of Appeals, however, concluded that the Board's interpretation of the Glass-Steagall Act comported with both the plain language of the act and congressional purposes. Consequently consideration of the degree of deference was not only appropriate but prescribed by this Court.

In applying the correct standard of review the Court of Appeals did not interpret the Glass-Steagall Act "as it thought best," but rather inquired into whether the Board's construction of the act was " 'sufficiently reasonable' to be accepted by a reviewing court." (8a, *quoting* 454 U.S. at 39.) In addition the Court of Appeals considered the special deference this Court has consistently shown to the Board. (9a & n.22.) This Court has emphasized that "[o]ur obligation to accord deference to the

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[17] In support, petitioners cite *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981). In that case the Court held that deference to the Commission's statutory construction was warranted, but stated that any discussion of the degree of deference would be unnecessary if a court determined that an agency's statutory construction violated the plain language of the statute as well as congressional purposes. *Id.* at 31. In the other cases cited by petitioners the Court held that deference to a particular agency was not warranted only because the agency's interpretation of a statute was wholly unsupported (unlike the instant case). *See Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973) (there were "compelling indications" that the agency's interpretation was wrong); *Zuber* v. *Allen*, 396 U.S. 168, 193 (1969) ("[t]hose props that serve to support a disputable administrative construction are absent"); *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 318 (1965) (there was no "fair construction" of the statute to support the agency's determination). *Barlow* v. *Collins*, 397 U.S. 159 (1970), also cited by petitioners, is inapposite. That case did not involve the appropriate standard of review, but rather whether Congress, by statute, intended to preclude judicial review of administrative action.

Board's interpretive ruling" is particularly strong where the Board has expressly articulated its position and provided "guidance as to the effect of the Glass-Steagall Act on the proposed activity." *Board of Governors of the Federal Reserve System* v. *Investment Co. Institute*, 450 U.S. 46 (1981) [hereinafter cited as *ICI(2)*], at 68.[18] Because the Board Statement and Guidelines fully "recogniz[e] and addres[s] the concerns that led to the enactment of the Glass-Steagall Act" (*id.*), the Court of Appeals properly accorded a degree of deference to the Board.

II. The Decision Of The Court Of Appeals Does Not Conflict With Prior Decisions Of This Court.

A. The plain language of the Glass-Steagall Act does not prohibit banks from selling notes in the nature of a loan like commercial paper.

This Court has never considered the issue of whether commercial paper constitutes a "security" for purposes of the Glass-Steagall Act. Nor has this Court ever had occasion to construe the term "notes" as used in Section 21 of the act. Petitioners nevertheless contend that the decision of the Court of Appeals "conflicts with controlling decisions of this Court" by ignoring the "plain language"

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[18] *See Board of Governors of the Fed. Reserve Sys.* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978); *Board of Governors of the Fed. Reserve Sys.* v. *Agnew*, 329 U.S. 441, 450 (1947) (Rutledge, J., concurring). Petitioners suggest that the degree of deference accorded an agency depends upon whether the issues are "purely legal in nature." Petition at 12. All three cases cited above, however, involved legal issues of statutory construction, like the instant case. Moreover the Board's statutory construction in the instant case was premised in part on a comprehensive factual inquiry of Bankers Trust's commercial paper service and the function of commercial paper as a credit instrument in the nation's financial system.

of the act and giving the term "notes" a "narrower meaning" than intended by Congress. Petition at 13-15.

It is petitioners who ignore the plain language of the Glass-Steagall Act by construing the single term "notes" in isolation and completely out of context. Petitioners thus fail to heed this Court's instruction that a word in a statute "does not stand alone, but gathers meaning from the words around it."[19] The Court of Appeals properly construed the term "notes" by reference to its companion words: "stocks, bonds, debentures . . . or other securities." The specific inclusion of these other terms evidences congressional intent to include only notes in the nature of a security (*i.e.*, investment notes) within the limitations of the Glass-Steagall Act, not short-term notes in the nature of a loan such as commercial paper. (16a-17a.)

Moreover, to construe the single term "notes" in isolation to mean all notes, as petitioners do, would prohibit commercial banks from engaging in unquestioned and unquestionably lawful activities involving notes such as issuing certificates of deposit, dealing in bankers' acceptances, purchasing commercial paper for their own account, and selling loan participations. (16a n.48.) Such an unreasonable result clearly was not intended by Congress.[20]

Petitioners point out that Congress defined a "security" in the Securities Act to mean, *inter alia*, "any note"

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[19] *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). *Accord Third Nat'l Bank in Nashville* v. *IMPAC, Ltd.*, 432 U.S. 312, 322 (1977) (application of this principle to a federal banking statute).

[20] Apparently to mitigate the unreasonable results of their construction petitioners, without support or explanation, have throughout their petition (*e.g.*, at i, 5-6, 15) inserted the modifier "corporate"

(15 U.S.C. § 77b(1)) and rejected a proposal to exclude commercial paper from this definition, thereby evidencing that Congress knew how to limit the term "notes" in a statute when it wanted. Petition at 14 n.16.[21] In fact Congress did limit the term "notes" in Section 21 of the Glass-Steagall Act by including the companion words "stocks, bonds, debentures . . . or other securities." Moreover, as correctly determined by the Court of Appeals, the definition of "security" in the Securities Act does not apply to the Glass-Steagall Act because the two acts involve different subject matter and purposes. (20a-22a.) Indeed, this Court's recent interpretations of the Glass-Steagall Act "make no reference at all to the securities laws." (20a n.63.) Petitioners do not contend that the decision of the Court of Appeals not to apply the Securities Act definition of "security" to the Glass-Steagall Act was incorrect or in conflict with prior decisions of this Court.

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before the term "notes," thereby undercutting their entire plain language argument that the act prohibits the underwriting of *all* notes.

Petitioners claim that it is the Court of Appeals' construction that leads to unreasonable results by "implicitly" permitting banks to underwrite such instruments as short-term bonds and debentures. Petition at 15. But the Court of Appeals expressly and carefully limited its holding to the type of commercial paper specified in the Board's Guidelines. (30a.)

[21] Congress did, however, exempt commercial paper from the registration, though not the antifraud, provisions of the Securities Act. The Public Utility Holding Company Act of 1935, which petitioners cite together with the Securities Act, also defines a "security" to mean, *inter alia*, "any note," and hence also has an express exemption for commercial paper. 15 U.S.C. §§ 79b(a)(16), 79i(c)(3). Moreover petitioners fail to mention that commercial paper is excluded from the definition of "security" in the Securities Exchange Act of 1934. 15 U.S.C. § 78c(a)(10).

Finally, petitioners argue that this Court has indicated that the term "securities" as used in the Glass-Steagall Act should be construed broadly, and hence that any construction limiting the scope of the term (*i.e.*, by excluding notes like commercial paper) contravenes the holding in *ICI(1)*. Petition at 14.[22] In fact this Court held in *ICI(1)* that the term "securities" could not be construed so narrowly as to exclude participating interests in an open-end mutual fund. 401 U.S. at 635. While this Court stated that the term "securities" was broad enough to encompass both equity and debt securities, it does not follow from this statement that the term should be given so broad a definition that it would encompass traditional commercial credit instruments, including notes such as bankers' acceptances, certificates of deposit, and commercial paper.

In sum, the decision of the Court of Appeals comports with the plain language of the Glass-Steagall Act and the prior decisions of this Court.

B. Bankers Trust's commercial paper service does not give rise to potential hazards.

Petitioners also argue that the decision of the Court of Appeals violates congressional purposes in enacting Glass-Steagall. One of those purposes was to prevent

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[22] In addition to *ICI(1)* petitioners cite three other cases in support of this argument. Petition at 14 n.15. In *ICI(2)* this Court did not discuss whether a broad or narrow construction of the act was more proper. In the other two cases, *Board of Governors of the Fed. Reserve Sys.* v. *Agnew*, 329 U.S. 441 (1947), and *Awotin* v. *Atlas Exchange Nat'l Bank*, 295 U.S. 209 (1935), construction of the term "securities" in the act was not at issue. Indeed, *Awotin* did not even involve the Glass-Steagall Act, but rather the McFadden Act, as originally enacted by Congress six years prior to Glass-Steagall.

hazards that potentially arise when a bank engages in certain speculative securities activities. Petitioners contend that the decision of the Court of Appeals did not fully account for these potential hazards and thus conflicts with this Court's decision in *ICI(1)*. Petition at 16-18. It is clear from its opinion, however, that the Court of Appeals considered all of the potential hazards discussed by this Court in *ICI(1)* and found that a bank's sale of commercial paper in compliance with the Guidelines does not give rise to any of those hazards. (22a-30a.)

Petitioners contend that the Court of Appeals focused only upon "the characteristics of the instruments involved," thereby overlooking the hazards that may arise as a result of the bank's role in the transaction. Petition at 16. In fact the Court of Appeals thoroughly analyzed the bank's role in selling commercial paper and concluded: "The bank's role as seller does not threaten the bank with those dangers which the Glass-Steagall Act was designed to prevent." (28a.)

In their discussion of "potential hazards," petitioners can name only the bank's potential conflict of interest in promoting the sale of commercial paper. Petition at 16. After considering this point at length the Court of Appeals correctly concluded that there was no potential conflict of interest because: (1) the bank cannot use its credit facilities to extend credit to potential purchasers of commercial paper; (2) the bank is not in a position to abuse its reputation for prudence or give unreliable financial advice to its depositors in order to promote the sale of commercial paper; and (3) the bank's reputation for prudence will not suffer by its association with the issue of commercial paper. (28a-30a.) Thus petitioners' incantation of potential "hazards" is simply contrary to the facts and to the administrative record compiled by the Board.

Petitioners refer to the Guidelines as indicative of the Board's own recognition that "hazards" potentially exist. Petition at 17. The Guidelines were issued pursuant to the Board's authority "to restrain unsafe or unsound banking practices by State member banks" (18 U.S.C. § 1818) and thus address more general concerns of banking regulation than the specific kinds of hazards that are the concern of Glass-Steagall. Moreover this Court has encouraged the use of guidelines by the Board in promoting the aims of Glass-Steagall. In *ICI(2)* this Court noted that the restrictions on bank investment adviser services in the Board's interpretive ruling "avoided the potential hazards involved in any association between a bank affiliate and a closed-end investment company." 450 U.S. at 68. Similarly the Board's commercial paper Guidelines are in part designed to avoid any potential hazards that otherwise might be involved in the sale of commercial paper.

Petitioners argue that the Guidelines only "minimize," but do not eliminate, potential hazards because those hazards are "*inherent* in the combination of investment and commercial banking." Petition at 17.[21] This argument

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[21] As an example petitioners point to the 1970 default by Penn Central on its commercial paper notes, which were marketed by Goldman, Sachs & Co., a member of petitioner Securities Industry Association, as "prime" quality commercial paper only weeks before the default. Petition at 18. The sale of commercial paper, like many other traditional commercial banking activities including bank loans, obviously is not completely risk free. As recognized by the Court of Appeals, however, "the default rate on commercial paper is much lower than that on ordinary commercial loans made to high-grade commercial customers." (25a-26a & n.79.) Moreover the Penn Central case is an example of a breakdown in the corporate disclosure system; it no more demonstrates that commercial paper is inherently a speculative instrument than the financial accounting and disclosure

is based on a fundamental misunderstanding of the Glass-Steagall Act: that it mandates a "complete separation" of activities performed by commercial banks and securities firms. Petition at 12. This Court has recognized, however, that although the act "prohibits" a securities firm from engaging in the commercial banking business, the act only "places a limit on the power of a bank to engage in securities transactions." *ICI(2)*, 450 U.S. at 62. Thus, whether a securities firm engages in a particular activity (*e.g.*, selling commercial paper) does not necessarily mean that a commercial bank cannot lawfully do the same.

Indeed there are a number and variety of lawful intersections between the activities of commercial banks and securities firms. As noted by the United States Department of Justice in recent hearings before Congress:

> Within the limitations imposed by the Glass-Steagall Act, banks have offered automatic investment plans for the purchase of securities, dividend reinvestment plans, and a variety of financial services, including commercial paper and private placement services, to corporate and governmental clients.[24]

The question then is not whether a commercial bank competes with a securities firm in offering a particular

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problems experienced in 1975 by New York City are proof that municipal securities are speculative instruments. *See* Securities and Exchange Commission Staff Report on the Financial Collapse of the Penn Central Company (Aug. 1972); Final Report in the Matter of Transactions in the Securities of the City of New York, Securities Exchange Act Release No. 13547 at III and Appendix at Ch. 2, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,936 (1979).

[24] Testimony (at 5) of William F. Baxter, Assistant Attorney General, Antitrust Division, United States Department of Justice, on July 8, 1981 before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary in hearings regard-

service, but whether the commercial bank thereby runs the risk of potential hazards that Congress intended Glass-Steagall to prevent. The Court of Appeals correctly determined that a bank's acting as agent in the sale of commercial paper in compliance with the Guidelines does not give rise to any such hazards.

CONCLUSION

For the foregoing reasons the joint petition for writ of certiorari should be denied.

Respectfully submitted,

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June 30, 1983

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ing the structure of the financial services industry. (A copy of Mr. Baxter's testimony from these as-yet-unpublished hearings was appended to the *amicus curiae* brief filed by Bankers Trust with the Court of Appeals on January 22, 1982.) *See also* D. Ratner, "Deregulation of the Intersection of the Banking and Securities Industries," *The Deregulation of the Banking and Securities Industries* 326 (1979).